Supreme Court, U.S.
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89-1448

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN B. HAWLEY, INDIVIDUALLY AND
AS NEXT FRIEND FOR G. P. HAWLEY, A MINOR
Petitioners

v.

ROY S. KENDALL, SHAUN M. MILLER,
EARL E. NEWSOM AND THE CITY OF DALLAS, TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN B. HAWLEY
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PRO SE

QUESTIONS PRESENTED FOR REVIEW

Whether in 1985, a police officer must stop talking to a minor child under the age of five years, when ordered to do so by a parent-attorney of that child.

Whether, in 1985, the Texas parental rights, privileges, duties and powers statute [Texas Family Code §12.04] allows, permits and/or requires a parent to stop a police conversation with that parent's child when the parent believes the child is being terrified by the conversation and whether the disregard of those state rights and powers give rise to a 42 U.S.C. 1983 cause of action.

Whether a police officer may claim "unsettled law" as a basis for dismissal of litigation when that same officer has formally acknowledged that he believed, at the time of the alleged abuse, the law to be what the abused citizen claims was the law.

Whether by submitting to discovery, a

defendant police officer waives his right to qualified immunity under *Mitchell v Forsyth.*

Whether the City of Dallas, Texas, itself is liable under 42 U.S.C. 1983 for allowing, through the express written policy of that City, the incarceration of persons charged with only non-jail offences (Class C misdemeanors) at the unfettered discretion of its police officers regardless of the showing of a need for detention or other legitimate governmental purpose, when such unfettered discretion was a cause of unlawful acts by individual defendant officers herein.

NAMES OF ALL PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of this case.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW. i

NAMES OF ALL PARTIES ii

OPINION BELOW 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION AND . . . . . .

STATUTES INVOLVED 1

STATEMENT 7

REASONS FOR GRANTING THE PETITION 11

REASONS ON QUESTIONS ONE AND TWO 11

REASONS ON QUESTIONS THREE AND FOUR 20

REASONS ON QUESTION FIVE 22

CONCLUSION. 31

CERTIFICATE OF SERVICE. 34

APPENDIX A 1a

APPENDIX B 6a

APPENDIX C 16a

TABLE OF AUTHORITIES

CASES **PAGE**

Anderson v Creighton 483 U.S. 635,
107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). . . . . 21.

Ashcroft v. Mattis 431 U.S. 171,
97 S.Ct. 1739, 52 L.Ed.2d 219 (1977). . . . . 12.

Bell v. City of Milwaukee 746 F.2d
1205 at 1246 (7thCir.1984) . . . . . .13.

Bell v Wolfish 441 U.S. 523,
99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). . . .27-28.

City of Houston v Hill 482 U.S. -- ,
107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). . .10, 31.

Graham v. Conner -- U.S. --,
109 S.Ct. 1865 (1989) . . . . . 12, 17, 22, 31.

In Re: Newchurch
807 F.2d 404 (5th Cir. 1986). . . . . 28.

Kelson v. City of Springfield
767 F.2d 651 (9thCir.1985) . . . . . 14.

Logan v. St. Clair
711 F.2d 690 (5thCir.1983) . . . . . 16.

Mattis v. Schnarr 502 F.2d 588 (8thCir.1974), *appeal following remand vacated on other grounds sub nom., Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977) . . . . . 13-14.

Mitchell v Forsyth 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) . . .ii, 21.

Monroe v. Pape 365 U.S. 167, 81 S.Ct. 473 (1961) . . . . . 17.

Palmer v City of San Antonio, Texas 810 F.2d 514 (5th Cir. 1987). . . . . .24.

Quilloin v. Walcott 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) . . . . . .15.

Reynolds v United States 80 S.Ct. 30, 4 L.Ed.2d 46 (1959). [Douglas as Circuit Justice] . . . . . 27.

Sellers v United States 89 S.Ct. 36, 21 L.Ed.2d 64 (1968) [Black as Circuit Justice] . . . . . 28-29.

Trujillo v. Board of County Commissioners of County of Santa Fe 768 F.2d 1186 (10thCir.1985) . . . . . .14.

Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1079, 89 L.Ed.2d 251 (1986) . . . . . .30.

Wounded Knee Legal Defense/Offense Committee v. F. B. I.
507 F.2d 1281 (8thCir.1974) . . . . . .19.

STATUTES, FEDERAL

28 U.S.C. §1254(1). . . . . .2.

42 U.S.C. §1983. . . . . 7, 12, 14, 17.

STATUTES, TEXAS

Texas Family Code § 12.04
. . . . . .3-4, 7, 11, 16, 17, 18, 20.

General Orders of Dallas Police Department

General Order 305.10 . . . . . 5-6.

OTHER AUTHORITIES

ABA Standards for Criminal Justice,
Standard 10-2.2 . . . . . .18.

IN THE SUPREME COURT OF THE UNITED STATES
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ROY S. KENDALL, SHAUN M. MILLER,
EARL E. NEWSOM AND THE CITY OF DALLAS, TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John B. Hawley, individually and as next friend of G. P. Hawley, a minor, petitions, *pro se*, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-3a) is unreported. The memorandum and order of the district court (App. *infra*, 4a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on the 13th of December, 1989. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> ... and to have Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> ... nor shall any State deprive any person of life, liberty or

property, without due process of law ....

Section 12.04 of the Texas Family Code provides in pertinent part:

> Except as otherwise provided by judicial order or affidavit of relinquishment of parental rights ..., the parent of a child has the following rights, privileges, duties and powers:
>
> (1) the right to have physical possession of the child ...;
>
> (2) the duty of ... protection ... of the child;
>
> (7) the power ... to make other decisions of substantial legal significance concerning the child;
>
> (10) any other right, privilege, duty, or power existing

> between a parent and child by virtue of law.

[THERE ARE NO APPLICABLE STATUTES OR REGULATIONS KNOWN TO PETITIONERS AND NO STATUTES OR REGULATIONS ASSERTED BY RESPONDENTS WHICH DIMINISH THE RIGHTS OF A PARENT OR THE RIGHTS OF A CHILD.]

* * *

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure ... against unreasonable ... seizures, shall not be violated ....

The Eighth Amendment to the Constitution provides in pertinent part:

> Excessive bail shall not be required, ..., nor cruel and unusual punishments inflicted.

Section 305.10 of the General Orders of the Dallas Police Department provides in pertinent part:

> A. Generally, the misdemeanor citation will be used in every case of violation of the traffic code or non-traffic city ordinances wherein the officer is authorized to release the person charged on his own recognizance at the scene of the arrest.
>
> B. A prisoner arrested for a Class C Misdemeanor only who requires medical treatment will be taken directly to ... Hospital. .... No prisoner under these circumstances will be booked into jail unless an unusual situation exist and under supervisory approval. Also, the arresting officer must justify

placing the person in jail on the arrest report.

C. The misdemeanor citation **may** also be used in any other instance of charging a non-traffic ordinace as currently authorized by accepted procedures or as may be authorized in the future. These violations include ... the following: ... 11. Disorderly conduct.

D. In lieu of jail arrest, officers **may** issue a non-traffic citation for Municipal Court to the suspect in the above offences after first establishing positive identification then checking ... the suspect for outstanding warrants....

[underlined Emphasis in original; boldface **Emphasis** added.]

STATEMENT OF THE CASE

This is a 42 U.S.C. §1983 action for deprivation of various civil rights including but not limited to the parental rights, privileges, duties and powers of a parent set out in Section 12.04 of the Texas Family Code, and for related causes of action for false imprisonment, assault, battery, false arrest, malicious prosecution, and intentional infliction of emotional distress.

Petitioners are father and daughter who were stopped by City of Dallas police officers Kendall and Miller (individual respondents herein) in a routine traffic stop in Dallas, Texas, in September, 1985. During the course of the stop, Kendall began to lecture the minor daughter (then four years ten months of age) who was crying and became terrified at the imposing of Kendall. Hawley, the father, first requested and then demanded that Kendall stop trying to converse with his minor child. Kendall refused to stop imposing conversation

on the child and handcuffed and removed the father for making the demand. Miller (a trainee being field-trained by Kendall) did nothing to oppose Kendall's acts. After the handcuffing and successful imposition of conversation on the terrified child, City of Dallas police sergeant Newsom (individual respondent herein) came to the scene and approved the incarceration of the father (who had, at the very begining of the stop, confirmed to respondent Kendall his local community ties and provided positive identification by virtue of driver's license, automobile registration and insurance as well as local self-employment as an attorney in addition to having been cleared for outstanding warrants) on a charge of disorderly conduct for having too loudly

demanded his rights.[1] The father was released after five hours incarceration on $400.00 bond.

The father was charged with violation of "child passenger safety seat system" for a child over the age of two years and under the age of four years even though her age of 4 years 10 months was known to respondents Kendall and

---

[1] Since it is unclear whether the trial court dismissed for failure to state a claim upon which relief may be granted or granted a summary judgment, the statement of facts herein is taken from the Affidavit of petitioner John B. Hawley which was attached to *Plaintiffs' Response to Defendants' Motion to Dismiss or, Alternatively, Motion for Summary Judgment*, as well as from the Complaint itself.

The Court of Appeals found that summary judgment had been granted and accepted as true that petitioner herein was attempting "to prevent the policeman from badgering his daughter." (App., *infra*, page 3a).

Miller. The seat belt charge was dismissed for want of prosecution when neither Kendall nor Miller appeared at the trial to testify.

The father was also charged with disorderly conduct which charge was, after municipal court conviction, dismissed on appeal by a state trial court of record, based on the ruling by this Court in *City of Houston, Texas v Hill* 482 U.S. --- , 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). [Respondent Miller twice testified at hearings in that criminal case that the words which the father shouted in the "unreasonably loud voice" which constituted disorderly conduct were that he (the father) was being wrongfully arrested and that he (the father) wanted someone to call a sergeant].

This case was filed in September, 1987. Answers were timely filed and discovery begun in December, 1988, by the taking of depositions without objection of two individual respondents herein and of the successor chief

of police (a non-party to this cause). In January, 1989, the trial court issued unsolicited leave for respondents to file Motion to Dismiss or for Summary Judgment, which respondents filed and to which petitioners duly responded with affidavits and deposition excerpts.

A memorandum order and judgment dismissing petitioners' civil rights claims against the individual respondents on the basis of qualified immunity and dismissing petitioners' civil rights claims against the City, was entered by the trial court in April, 1989.

A memorandum order affirming the trial court's rulings was issued by the United States Court of Appeals for the Fifth Circuit on 13 December, 1989.

REASON FOR GRANTNG THE PETITION

REASONS ON QUESTIONS ONE AND TWO:

The Court of Appeals held that because Section 12.04 of the Texas Family Code does not

specify a legal consequence for interference with rights, priviledges, duties and powers granted a parent by that section, that court finds no authority for petitioner's claims against the officers.

This decision directly conflicts with other courts of appeal on the enforceability of parental rights through 42 U.S.C. 1983 and with the applicable decisions of this Court.

In addition this case affords this Court an opportunity to begin to address the issues it was unable to reach in dismissing a parent's claim for interference with parental relationship in *Ashcroft v. Mattis* 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

* * *

As this court "has said many times, §1983 is not a source of substantive rights but merely provides a method for vindication federal rights elsewhere conferred." *Graham v. Conner* -- U.S. --; 109 S.Ct. 1865 at 1870 (1989).

The Seventh, Eighth, Ninth and Tenth Circuits have each found that parents have a Constitutionally protected right to the maintenance of a parent-child relationship:

> "[Parents have a] constitutional right to raise, associate with and to make decisions affecting the family."

Bell v. City of Milwaukee 746 F.2d 1205 at 1246 (7thCir.1984).

> "The familial relationship between a parent and a child is fundamental to our civilization. ....
>
> "We do not believe the Constitution excludes this fundamental relationship from its protection. ...
>
> "We believe that parenthood is a substantial value and protected from deprivation without due process of law--a fundamental legal right. The plaintiff alleges that this fundamental relationship has been invaded. "

Mattis v. Schnarr 502 F.2d 588 at 594-595 (8thCir.1974), *appeal following remand vacated on other grounds sub nom., Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

> "Parents ... possess constitutionally protected interest in the companionship and society of their children.... This court has previously held that such a liberty interest exists and is cognizable under section 1983."

Kelson v. City of Springfield 767 F.2d 651 at 653-654. (9thCir.1985).

> "[P]arental relationships ... warrant the greatest degree of protection and require the state to demonstrate a ... compelling interest to justify an intrusion on that relationship ... [and we include them in] the remedy established by section 1983."

Trujillo v. Board of County Commissioners of County of Santa Fe 768 F.2d 1186 at 1899

(10thCir.1985).

This Court has been no less assertive of the Constitutionally protected rights of parents:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. ....
>
> "We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." (citations omitted)

Quilloin v. Walcott 434 U.S. 246 at 255, 98 S.Ct. 549 at 555, 54 L.Ed.2d 511 (1978). Petitioners respectfully submit that the hypothetical facts above are precisely the facts of this case according to respondents, who attempt to

justify the police conduct by claiming Kendall was trying to comfort the child. (*See*: footnote 1 of the district court's opinion, App., *infra*, page 7a).

Even the Fifth Circuit itself has acknowledged that "[t]he courts have long recognized that the Constitution protects the family and basic family practices. Cases have involved ... upbringing of children ...." *Logan v. St. Clair* 711 F.2d 690 at 691 (5thCir.1983).

Nonetheless, in the instant case the Fifth Circuit recognizes none of these rights in affirming the dismissal by the trial court, even though the Fourteenth Amendment and the Ninth Amendment were expressly pleaded in the Complaint (App. *infra*, page 16a through 29a) as well as Texas Family Code §12.04.

Rather it seems to say that because 12.04, in itself, does not "express what legal consequence will follow from a third party's conduct toward the child," (App., *infra*, 3a)

there is no basis for a claim against the police officers. This reasoning completely ignores the fact that section 1983 provides the "method for vindicating federal rights elsewhere confered" (*Graham v. Conner, supra)* by expressly stating the legal consequences from a third party's conduct (if under color of state law) in violation of the rights secured by the Constitution and laws. Whether 'Constitution and laws' includes rights from state statutes or federal rights only would not necessarily be reached in this case since section 12.04 itself expressly reiterates and reconfirms all existing rights in its paragraph 10: "a parent of a child has: ...(10) any other right, privilege, duty or power existing between a parent and a child by virtue of law." And the fact that a state provision concurrently gives the same rights as a federal provision "is no barrier to the present [section 1983] suit in federal court." *Monroe v. Pape* 365 U.S. 167 at 183, 81 S.Ct. 473 at 482 (1961).

Moreover, the Texas statute, in addition to specifying parental rights (paragraphs one and seven of section 12.04) and reiterating parental rights (paragraph ten), specifies legal duties of the parent including the duty to protect the child (paragraph 2). Petitioners respectfully submit that the familial obligation of a parent to his child is at least as compelling as the professional obligation of an attorney to his client and the attorney-client obligation has been soundly deemed to be worthy of federal protection:

> "With even stronger force it may be said that a lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel. It requires no citation of authorities to reaffirm our historic commitment to effective assistance of counsel in criminal

> cases. That right may not be fettered by harassment of governmental officials, and any claim which factually asserts such harassment presents a federal question for our presentation."

Wounded Knee Legal Defense/Offense Committee v. F. B. I. 507 F.2d 1281 at 1284 (8thCir.1974). It is also of no small importance to petitioners that the attorney-client relationship between them, happenstance though it may have been in this case, was utterly disregarded by the respondent officers, and that disregard is also a basis of petitioners' claims dismissed in this case.

In view of the above, a police officer, when ordered to do so by a parent-attorney of that child, must stop talking to a minor child under the age of five years, as well as stop any other intrusion into a parent-child relationship unless that officer can show a compelling state interest. Since no compelling state interest has

been offered or alleged in this case for the disregarding of parental rights and for the terrifying imposing of lecture and other conversation by respondents herein, the opinion of the court of appeals should be taken for review by this Court as being in conflict with the above cases from the other circuits and cases from this Court.

REASONS ON QUESTIONS THREE AND FOUR:

The Court of Appeals correctly held that the "subjective belief" [of an officer] is not enough to establish what a violation of 12.04 of the Texas Family Code may consist of." (App., *infra*, 4a). However, the point raised by petitioners' was different. Petitioners asserted that because respondents Kendall and Newsom had acknowledged in their respective depositions that section 12.04 accurately stated the law as they understood it to be at the time of the incident, neither could thereafter assert

"unsettled law" as a means of claiming qualified immunity under *Mitchell v Forsyth* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

The allocation of burden of proof for establishing "unsettled law" has been correctly placed on those officials who seek the protection of qualified immunity: defendant officers are entitled to qualified immunity "if [they] could establish as a matter of law that a reasonable officer could have believed that [the acts] were lawful." *Anderson v Creighton* 483 U.S. 635, 107 S.Ct. 3034 at 3038, 97 L.Ed.2d 523 (1987).

This aspect of qualified immunity and the aspect of waiver of immunity by respondents' submitting to discovery without objection, were not reached by the Court of Appeals but each aspect was well raised on appeal and each aspect challenges the very basis of dismissal of the individual respondents by the trial court. Therefore, this case affords an additional

opportunity to address the important federal question of qualified immunity and its availablity in the face of agreement about applicable law as well as a first opportunity to address its waiver by failure to claim the immunity in a timely fashion (*ie.* prior to submitting to discovery).

REASONS ON QUESTIONS FIVE:

This Court specifically left for future resolution the "question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins...." *Graham v. Conner, supra*, at 1871 [note 10]. This case provides the opportunity to begin the resolution of that issue for the decision by sergeant Newsom to incarcerate petitioner-father herein for too loudly asserting his rights is clearly denoted and the unnecessariness (and

petitioners would argue, unconstitutionality) of the incarceration in this case is clear. Unfortunately the court of appeals has so far missed the thrust of the question, that it might be inaccurate to suggest that "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court" as a basis for granting review of this case. Rule 10.1(c) of the Supreme Court. Nonetheless, petitioners respectfully submit that it is an important question of federal law which this Court should address.

* * *

The Court of Appeals states that petitioners' brief "refers to no facts establishing a policy or custom in the City of Dallas to encourage police officers to 'interview and indoctrinate' minor children in front of their parents." This is true, the brief makes no reference to the City specifically encouraging

interview and indoctrination. Petitioners' assertion is that the City of Dallas encourages all abusive actions against arrestees (including punitive interview and indoctrination) by approving of any incarceration of any arrestee on any charge, without requiring justification by the officer for the non-use of personal recognizance citation which the officer is authorized to issue. The written policy of the City that allows such unfettered discretion is cited in petitioners' complaint (App., infra, 23a), in petitoners' brief below and on pages 5-6, *supra*. This completely arbitrary power to incarcerate any arrestee on any charge without

showing a need or justification causes[2] Dallas police officers deliberately to abuse arrested persons and if the arrested person asserts his rights in response to the abuse, then to incarcerate the arrestee and still be totally within the scope of approval provided by the written policy of the City. This retaliation incarceration is automatically approved by the City because the City policy approves every incarceration without requiring officer justification or explanation (except of an arrestee needing medical attention: in that sole

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[2] "If the police officers know at the time they act that the [unlawful act] will meet with the approval of the city policy makers, then the causation requirement has been met." *Palmer v City of San Antonio, Texas* 810 F.2d 514 at 516 (5thCir.1987). The unlawful act the City of Dallas approves of is retaliation incarceration which, by threat or deed, suppresses resistance to every other unlawful act by the police.

instance must the officer justify the incarceration). Petitioners have specifically pleaded that the unnecessary incarceration of petitioner-father without the opportunity to sign a personal recognizance citation in the instant case was done on supervisory approval. (App., *infra*, 23a). Additionally, in his deposition, the chief of police himself expressly approved the very actions of the respondent officers in this case and the chief of police is, by written policy of the City of Dallas, the policymaker for general orders of the police department. The chief of police further stated in his deposition that he saw no reason in the facts of this case to change the unlimited discretion of Dallas police officers to incarcerate without justification.

It is the position of petitioners that, in the absence of a compelling state interest, when an arresting officer has the authority to release an accused person on a personal recognizance

citation, and does not do so but requires some additional security for release, without some showing by the officer of the inadequacy of the citation to assure attendance at trial, then that additional security requirement is a *per se* imposition of excessive bail and the incarceration preliminary to the settling of that excessive bail is actionable under the Due Process Clause of the Fourteenth Amendment as a denial of liberty without trial or compelling state interest. Moreover, the deliberate incarceration preliminary to the settling of bail known to be excessive is forbidden under the Eighth Amendment as cruel and unusual punishment if the intent of the denier or the incarcerator is maliciously to inflict harm by the denial or by the incarceration or by any other foreseeable consequence, such as the terrifying estrangement of a child of tender years or the anguish and helplessness of a father listening

in frustration to the screams of his daughter.

The only Constitutional purpose of bail is to assure the charged person will appear at the trial. "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. It is never denied for the purpose of punishment...." *Reynolds v United States* 80 S.Ct. 30 at 32, 4 L.Ed.2d 46 at 48 (1959) [Douglas as Circuit Justice]. "[T]he government concededly may detain [a charged person] to ensure his presence at trial...." *Bell v Wolfish* 441 U.S. 520 at 536, 99 S.Ct. 1861 at 1873, 60 L.Ed.2d 447 at 467 (1979). "[I]f a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not related to a legitimate goal -- if it is arbitrary or purposeless -- a court may permissibly infer that the purpose of the governmental action is

punishment that may not be constitutionally inflicted on detainees...." *Bell, supra,* 441 U.S. 520 at 539, 99 S.Ct. 1861 at 1874, 60 L.Ed.2d 447 at 468. [emphasis supplied]. "Even when a governmental purpose is legitimate and substantial, ' "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ' A person accused of a crime should not therefore be deprived of personal liberty unless his confinment is reasonably necessary to assure his presence at trial or to protect some other important governmental interest." *In Re: Newchurch* 807 F.2d 404 at 408-409 (5thCir.1986). "The command of the Eighth Amendment that 'Excessive bail shall not be required* * *' *at the very least* obligates judges passing upon the right to deny such relief only for the strongest of reasons." *Sellers v United States* 89 S.Ct. 36 at 38, 21 L.Ed.2d 64 at 66 (1968) [Black as

Circuit Justice] [emphasis in original]. Petitioners would respectfully submit that the Eighth Amendment obligates officers passing on the right to personal recognizance bail to deny such relief only for some objective reason related to a legitimate state interest. Since no reasons are present in the instant case, the Eighth Amendment rights of petitioner-father have been violated by the individual officers acts and by the City's blanket approval of all incarcerations including the retalitory incarceration by the officers in this case as well as the specific, express approval by the policymaker for the City of the actual acts in this case.

Equally, in view of the above, any incarceration, however brief, to effect the setting of unnecessary bail is infered a punishment and, same being without trial, is a denial of liberty disallowed by the due process clause of the Fourteenth Amendment.

Moreover, any incarceration, however brief, to effect the setting of unnecessary bail in a non-jaii case is a punishment that is by definition, unusual for a fine-only offense and, by definition, in excess of the maximum penality allowed, thus is in violation of the Eighth Amendment prohibition against cruel and unusual punishments if the respondents have imposed that punishment "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312 at 320-321, 106 S.Ct. 1079 at 1084-1085, 89 L.Ed.2d 251 (1986). Petitioners' pleaded that individual respondents Kendall and Newsom intentionally inflicted emotional distress on petitioners, in part by their knowing subjection of petitioners confinement and to incarceration which was not allowed by any charge lodged against either of them and that allegation of intentional infliction of emotion distress should suffice to meet the requirement of subjective state of

mind noted for a finding of infliction of cruel and unusual punishment *Graham v. Connor*, *supra*, 109 S.Ct. at 1873.

Lastly, petitioners claim the handcuffing and physical confinement was objectively unreasonable under the Fourth Amendment for the circumstances of this case unless the father truly had no right to maintain his parent-child relationship without police intrusion and truly had no applicable duty to protect his child from the terror of the imposing individual respondents.

CONCLUSION

This Court has told the City of Houston that it may not, by overbroad ordinance, suppress a citizen's enjoying or asserting his free speech rights. *City of Houston, Texas v Hill* 482 U.S. --- , 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

Petitioners in this case ultimately ask this Court to tell the City of Dallas that it may not,

by overbroad discretion to incarcerate, suppress a citizen's enjoying or asserting his parental relationship rights.

The American Bar Association Standards on Criminal Justice recommends the standard (Standard 10-2.2) that petitioners would urge be adopted for mandatory issuance of citation to avoid the abuses in this case. Moreover, the City of Dallas, Texas already imposes such a justification for incarceration requirement on its police officers if the accused person needs medical attention. Therefore there would be no additional novel burden on the officers, merely the extention of an existing requirement to allow all citizens accused of non-jail offenses to be treated the same as unhealthy citizens.

For all of the above reasons, petitioners and each of them pray this Court grant review of this case.

PRAYER

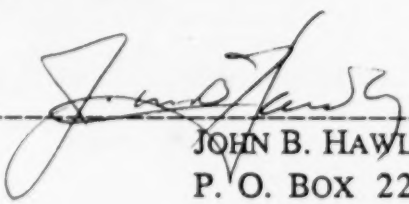
Petitioners pray this honorable Court

issue Writ of Certiorari in this cause

and for such further and other relief both at law and in equity to which Petitioners and either of them may show themseves or either of them to be entitled.

Respectfully submitted,

JOHN B. HAWLEY, INDIVIDUALLY AND AS NEXT FRIEND OF G. P. HAWLEY, A MINOR, Appellants



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CERTIFICATE OF SERVICE

I, John B. Hawley, do hereby certify that I have delivered three true and correct copies of the above and foregoing Brief for Appellants to Sam A. Lindsey, Assistant City Attorney, City Hall, Dallas, Texas 75201, on this the 13th day of March, 1990 by Hand delivery.

John B. Hawley

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1456
Summary Calendar

JOHN B. HAWLEY, INDIVIDUALLY AND AS NEXT FRIEND FOR G.P. HAWLEY, A MINOR,

Plaintiff-Appellant,

versus

ROY S. KENDALL, SHAUN M. MILLER, EARL E. NEWSOM AND THE CITY OF DALLAS, TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA3-87-2174-G)

(December 13, 1989)

Before GEE, DAVIS, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public

Appellant John Hawley was arrested after he became involved in an altercation with a Dallas police officer who stopped him for a seatbelt violation. It appeared that his daughter, who was riding in the front seat of his car and was four years ten months old at the time, did not have her seat belt on. We accept as true for purposes of this appeal Hawley's assertion that he was arguing with the officer in an attempt to prevent the policeman from badgering his daughter. Hawley was arrested for disorderly conduct and the seatbelt violation. He was incarcerated briefly upon his arrest, but he was not prosecuted for the charges against him. He sued the officers and Dallas County. The

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and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

district court granted a summary judgment to the defendants. We affirm.

Hawley's first three issues contend that § 12.04 of the Texas Family Code permitted him to terminate the police interview of his child when he believed the child was being terrified by the interview. He also interprets that provision to require a police officer to stop talking to a minor child when ordered to do so by its parent. Thus, he asserts that Officer Kendall violated state law by continuing to talk to his child. Section 12.04 defines the duties and responsibilities of a parent under Texas Law. It does not, however, express what legal consequence will follow from a third party's conduct toward the child. The provision neither renders it illegal for an officer to attempt to talk to a minor child, nor does it immunize the parent's response from any possible legal liabili.y. We find no authority in § 12.04 for Hawley's claim against the police

officers. Summary judgment was properly granted on this claim.

It does not matter whether the officer "believed" at the time of the incident that a parent has a right to cease the interrogation of his child. Officer Kendall also testified that he did not believe he was violating the law. In any event, subjective belief is not enough to establish what a violation of § 12.04 of the Texas Family Code may consist of.

Because we find no violation of law in the officer's conduct, we need not rule on Hawley's fourth point, which asserts that a defendant police officer waives his right to qualified immunity by submitting to discovery.

Hawley's last point of error seems to challenge the policy of the city of Dallas, Texas in regard to both his arrest and brief incarceration. A city cannot be liable for civil rights violations under a theory of respondeat superior or vicarious liability. **Monell v. New**

York City Department of Social Services, 436 U.S. 658, 694 (1978). It can only be held liable if its official policy, expressed as a statement, ordinance, regulation or official decision, or custom causes a person to be deprived of a federally protected right. Id. Hawley's brief refers to no facts establishing a policy or custom in the City of Dallas to encourage police officers to "interview and indoctrinate" minor children in front of their parents. Hawley has not advanced proof regarding any city policy or custom that would invalidate his arrest on disorderly conduct charges. Finally, Hawley does not explain why a brief incarceration on a misdemeanor offense, pending bail, is unconstitutional. There was simply no involvement by the City of Dallas in its official policy or custom which could expose it to liability for the officers' arrest of Hawley.

The trial court's summary judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Cause CA3-87-2174-G

JOHN B. HAWLEY, individually and as next friend of G. P. HAWLEY, a minor

vs.

ROY S. KENDALL, SHAUN M. MILLER, EARL E. NEWSOM and the CITY of DALLAS

MEMORANDUM ORDER

This case is before the court on the motion of defendants City of Dallas, Roy S. Kendall ("Kendall"), Shaun M. Miller ("Miller") and Earl E. Newsom ("Newsom") to dismiss or, alternatively, for summary judgment. The facts of the case are summarized in the footnote.[1]

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1 Kendall, Miller, and Newsom are police officers for the defendant City of Dallas. On September 6, 1985, plaintiff John B. Hawley ("Hawley") -- accompanied by his then four year and ten-month old daughter G.P. Hawley ("G.P.") -- was stopped by the officers for a child restraint

(i.e., seat belt) violation. Although Hawley demanded that officers Kendall and Miller stop talking to his daughter, who was crying, they continued nevertheless.

Kendall asserts that the officers were trying to comfort G.P. Kendall-deposition at 39. Hawley contends that they were indoctrinating her with their own ideas of safety. Complaint at 3. At all events, Hawley began to shout at Kendall. Kendall, believing himself in danger of physical assault, handcuffed Hawley, advising him meanwhile that he was under arrest for disorderly conduct. Arrest Report at 2-4. Hawley was charged with violation of the child-restraint law, Texas Revised Civil Statutes, Art. 6701d Sec. 107C(c) (Vernon Supp. 1989), and disorderly conduct under Texas Penal Code § 42.01 (Vernon 1989).

In this action, Hawley alleges violation of his civil rights and various pendent state law claims.

I. Analysis

A. Qualified Immunity

Qualified immunity shields government officials who are performing discretionary functions from liability for civil damages if their actions could reasonably have been considered consistent with the rights they are claimed to have violated. The court must assess the objective legal reasonableness of the actions, in light of the legal rules that were clearly established at the time. The contours of the rights allegedly violated must have been clear enough for a reasonable official to have understood that he was violating those rights. Thus, in light of preexisting law, the unlawfulness of the defendants' acts must have been apparent. Anderson v. Creighton, _____ U.S. _____, 107 S.Ct. 3034, 3038 (1987); Matherne v. Wilson, 851 F.2d 752, 756-57 (5th Cir. 1988); Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988). The court must measure

the "law's certainty" against "an objectively reasonable view of the facts facing an official." Matherne, 851 F.2d at 756.

In response to this motion, Hawley has identified two acts of the officers he contends to be unlawful. First, he maintains that the defendant officers violated Texa Family Code § 12.04 (Vernon 1986) by continuing to speak to G.P. after he, as her father, denied them permission to do so. Although § 12.04 governs parental rights, no provision of that statute requires peace officers to cease speaking to minors upon parental request. Thus, in light of preexisting law, any unlawfulness of the "continued speaking" was not apparent.[2]

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[2] Although not raised in his response, Hawley's complaint alleges that the determination of a child restraint violation was wrongful. Hawley has failed, however, to show apparent unlawfulness. Tex. Rev. Civ.

Second, Hawley urges that his arrest for disorderly conduct was wrongful. Under Tex. Code Crim. Proc. Art. 14.01 (Vernon 1977), however, such an arrest is lawful. See also Brown v. State of Texas, 594 S.W.2d 86, 87 (Tex. Crim. App. 1980) (Art. 1401 permits arrest for disorderly conduct). Consequently, his arrest was not apparently unlawful.

The same may be said of Hawley's claim about discretion under General Orders § 300, et seq., insofar as this claim relates to the officers themselves.[3] Hawley contends that the discretion to arrest given the officers by the

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Stat. Art. 6701d Sec. 107C requires seat belt restraints for children ages 4 to 15.

[3] Hawley appears to assert that his arrest and subsequent jailing were illegal because child restraint (i.e., seat belt) violations are punishable only by a fine. Because arrest is prior to punishment, however, his argument misses the mark.

General Orders violated his constitutional rights in two respects. First, he argues that this discretion was a per se violation of the Constitution. Yet he has presented no authority in support of this bald proposition, and the court has found none. Alternatively, he argues that his rights under the Constitution were violated here in two particulars. First, he asserts a violation in that when he was exercising his "statutory rights in regard to his own child," he was charged with disorderly conduct "for resisting the intrusions of a non-parent." However, as detailed above, Texas Family Code § 12.04 does not confer on him the rights he asserts, nor do such rights derive from the Constitution. Second, Hawley alleges that he was "incarcerated" rather than being taken immediately before a magistrate in compliance with Tex. Code Crim. Proc. Art. 14.06 (Vernon 1977). Art. 14.06 does not require, however, that an arrestee be taken

before a magistrate immediately but only "without unnecessary delay." See Tex. Code Crim. Proc. Art. 14.06. Hawley urges alternatively that his rights were violated even under the "unnecessary delay" standard. Yet he has not stated any facts which would demonstrate unnecessary delay. See Elliott v. Perez, 751 F.2d 1472, 1479 n.20 (5th Cir. 1985) (more that conclusory allegations needed; complainant must support civil rights claims by reference to material facts); Hale v. Harney, 786 F.2d 688, 690 (5th Cir. 1986) (same); Matter of Lewisville Properties, Inc., 849 F.2d 946, 950 (5th Cir. 1988) (on summary judgment, non-movant may not rely on naked assertions of dispute, but must adduce admissible evidence creating a fact issue as to each essential element of the claim).

Consequently, the defendant officers are entitled to qualified immunity, and Hawley's

civil rights claims against them must be dismissed.

B. City of Dallas

The civil rights claims against the City of Dallas must also be dismissed. A civil rights plaintiff such as Hawley must identify "(1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of consitutional right." The policy or custom must be the moving force of the constitutional violation. Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987).

Hawley alleges that the discretion to arrest given officers under General Order 305.10 was such a policy. The court finds, however, that Hawley has failed to meet his burden under the Palmer standard.

First, Hawley has not demonstrated the existence of a constitutional violation, as explained above. Second, he has not demonstrated that the discretion given the

defendant officers by General Order 305.10 was the moving force of the violation. Consequently, Hawley's civil rights claims against the City of Dallas must also be dismissed.

III. Conclusion

Hawley's civil rights claims against the defendants are DISMISSED with prejudice. The court declines to exercise pendent jurisdiction over the remaining state law claims and therefore dismisses them without prejudice. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

SO ORDERED.

April 25, 1989

/s/ A. Joe Fish

A. JOE FISH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Cause CA3-87-2174-G

JOHN B. HAWLEY, individually and as next friend of G. P. HAWLEY, a minor
vs.
ROY S. KENDALL, SHAUN M. MILLER, EARL E. NEWSOM and the CITY of DALLAS

JUDGMENT

For the reasons stated in the memorandum order of this date, it is ORDERED that plaintiff take nothing from defendants and that defendants recover their costs of court.

April 25, 1989

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Cause CA3-87-2174-G

JOHN B. HAWLEY, individually and as next friend of G. P. HAWLEY, a minor

vs.

ROY S. KENDALL, SHAUN M. MILLER, EARL E. NEWSOM and the CITY of DALLAS

COMPLAINT

Now comes John B. Hawley, Plaintiff in the above numbered and entitled cause, both individually and as next friend of G. P. Hawley, a minor, and for this their Complaint would respectfully show this honorable Court as follows:

I.

JURISDICTION

Jurisdiction in this cause derives from 28 U.S.C. §1343.

II.

PARTIES

Defendant Roy S. Kendall is a police officer of the City of Dallas, Texas, and may be served with process at the Dallas Police Department, Main and Harwood Streets in Dallas, Dallas County, Texas.

Defendant Shaun M. Miller is a police officer of the City of Dallas, Texas, and may be served with process at the Dallas Police Department, Main and Harwood Streets in Dallas, Dallas County, Texas.

Defendant Earl E. Newsom is a police officer of the City of Dallas, Texas, and may be

served with process at the Dallas Police Department, Main and Harwood Streets in Dallas, Dallas County, Texas.

Defendant City of Dallas is an incorporated city of the State of Texas, and may be served with process through the person of the City Attorney of the City of Dallas, at 1500 Marilla, Dallas, Dallas County, Texas.

III.

FACTS.

On or about the 6th of September, 1985, at about 8:15 P.M., Plaintiff John B. Hawley, accompanied only by his daughter, G. P. Hawley, was driving his own private passenger automobile on a public street in Dallas, Dallas County, Texas, when he was stopped by Defendants Kendall and Miller.

At the time, Defendants Kendall and Miller were each duly sworn police officers of the City of Dallas, Texas, in police uniform, operating a regularly marked City of Dallas police patrol vehicle; and each was then and there on active duty operating under the official General Orders and Code of Conduct of the Police Department of the Defendant City of Dallas, Texas, specifically including but not limited to Section 300.00 et seq of those General Orders.

During the course of that stop Defendant Kendall and Defendant Miller determined (wrongfully) that a seat belt violation or a child restraint violation had occurred, for the latter of which Plaintiff John B. Hawley was subsequently charged (wrongfully).

The seat belt violation as well as the child restraint violation are each Class C Misdemeanors for which the maximum penalty is a fine only with no provisions for incarceration; nonetheless Plaintiff John B. Hawley was incarcerated by Defendant Kendall and Defendant Miller for the alleged violation of child restraint.

Also, during the course of said stop by Defendant Kendall and Defendant Miller, an additional alleged offense was generated by them, when Defendant Kendall, with the acquiescence and consent of Defendant Miller, undertook to indoctrinate said minor child, G. P. Hawley, (then four (4) years and ten (10) months of age) with Defendant Kendall's own personal ideas of safety.

When Plaintiff John B. Hawley insisted that Defendant Kendall cease his lecturing and indoctrination of Plaintiff's child, Defendant Kendall handcuffed Plaintiff John B. Hawley and took him to the idling patrol car.

As Plaintiff John B. Hawley was being taken to the patrol car, he requested unsucessfully of pedestrian passersby that a Police Sergeant be called to stop the unlawful acts of Defendant Kendall and Defendant Miller, for which request Plaintiff John B. Hawley was (wrongfully) charged with Disorderly Conduct.

Disorderly Conduct is also a Class C Misdemeanor for which the maximum penalty is a fine only with no provisions for incarceration; nonetheless, Plaintiff John B. Hawley was incarcerated for that alleged violation of disorderly conduct.

After the handcuffing but prior to the incarceration of Plaintiff John B. Hawley, Defendant Earl E. Newsom, then a duly sworn uniformed Sergeant of the City of Dallas Police Department, on active duty and operating under the offical General Orders and Code of Conduct of the Police Department of the Defendant City of Dallas, Texas, specifically including but not limited to Section 300.00 et esq of those General Orders, appeared at the scene of the initial stop, reviewed the circumstances with Defendants Kendall and Miller and then shouted at Plaintiff John B. Hawley, "Book him for child restraint violation and disorderly conduct."

For neither the alleged child restraint violation nor the alleged disorderly conduct violation was Plaintiff John B. Hawley ever

given the opportunity to sign a Citation effecting a personal recognizance bond but rather, in accordance with the unlimited discretion expressly permitted to Dallas Police officers by the written policy of the City of Dallas in Section 305.10 of the General Orders of the Dallas Police Department, Plaintiff John B. Hawley was incarcerated for those non-jailable alleged offenses, all without prior trial, and in a imposition of excessive bail, by Defendant Kendall, Defendant Miller and, on supervisorial approval, by Defendant Newsom.

As a result of the illegal and unconstitutional arrest, imprisonment, familial estrangement, and terrific handling of Plaintiffs and either of them, Plaintiffs have suffered extensive psychological, emotional and personal damages in amounts in excess of ten thousand

dollars each for which damages Plaintiffs should have judgment against and recovery from Defendants and each of them, jointly and severally, in the total of damages sustained.

IV.

CAUSES OF ACTION

Defendants Kendall, Miller and Newsom were each acting under color of law as described above in depriving Plaintiff John B. Hawley of his constitutional rights:

> to due process not to be deprived of liberty and property by incarcerating him without trial,
>
> to reasonable and non-excessive bail by denying him release on a personal recognizance bond,
>
> not to be subjected to cruel and unusual punishment by incarcerating him in excess of the fine only punishment

permitted by the law governing Class C Misdemeanors,

not to be seized unreasonably by arresting and incarcerating him for non-offenses and/or offenses generated by the police, and

as well as those constitutional rights reserved under the Ninth Amendment and the Fourteenth Amendment to the United States Constitution specifically including but not limited to those rights, powers, priviledges and duties set forth in Section 12.04 of the Texas Family Code.

and in each of said deprivation of rights, the City of Dallas by its express written policy of unlimited discretion of its Police Officers to refuse personal recognizance bonds and to incarcerate persons charges only with Class C Misdemeanors, has established the official policy of said Defendant City of Dallas to allow the deprivation of said rights.

In addition, Plaintiff John B. Hawley asserts causes of action against Defendants and each of them for false imprisonment, assault, battery, false arrest and malicious prosecution by all Defendants and intentional infliction of emotional distress by Defendant Kendall and by Defendant Newsom.

Plaintiff G. P. Hawley asserts causes of action for assault, battery, false imprisonment, as well as deprivation under color of state law of her civil rights:

> to due process including right to counsel by the physical removal by all defendants of her next friend and attorney during a criminal investigation,
>
> to due process including effective right to counsel by the continued interrogation of her by Defendant Kendall and Defendant Miller after her next friend and attorney had instructed the interrogation cease,

to due process not to be deprived of liberty or property by being required by all defendants to accompany a police officer,

to due process not to be subjected to the punishment of lecture, reprimand and/or indoctrination without a trial as was done by Defendant Kendall,

not to be subjected to the cruel and unusual punishment of being terrorized by Defendant Kendall, Defendant Miller, and Defendant Newsom while she was emotionally, psychologically and personally vulnerable by age and circumstance, and

as well as those constitutional rights reserved under the Ninth Amendment and the Fourteenth Ammendment to the United States Constitution specifically including but not limited to those rights, powers, priviledges and duties to her benefit under Section 12.04 of the Texas Family Code.

WHEREFORE, PREMISES CONSIDERED, John B. Hawley and G. P. Hawley pray this honorable Court cite Defendants and each of them to Appear and Answer herein and upon final hearing

grant Plaintiffs and each of them judgment against and recovery from Defendants jointly and severally, in the amount of damages shown by Plaintiffs with pre-judgment interest and post-judgment interest thereon at the maximum rate allowed by law

grant Plaintiff John B. Hawley judgment against and recovery from Defendant Roy S. Kendall exemplary damages in twice the amount of actual damages but in no event less than $200,000.00.

Order the City of Dallas to establish a constitutionally acceptable policy for the bail of persons accused of only Class C Misdemeanors

and for such further and other relief both a law and in equity to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

JOHN B. HAWLEY, Individually, and as next friend of G. P. HAWLEY, a minor

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